Clark & Allen, or any part of it? From what we know, it would probably not have saved one dollar; and, therefore, the measure of damages stated in the plaintiff's print, and affirmed by the Court, which is in these words: "And the measure of damages is the amount received by said Clark, together with interest thereon, from the date of such receipt, unless reduced by the evidence offered by the defendants," is clearly erroneous, and the fourth assignment of error is sustained.

Judgment reversed and a *venire de novo* awarded.

Court of Appeals of New York.

STONE v. DRY-DOCK, E. B. & B. RY. CO.

Where a car driver so negligently drives in a city street as to run over a child of seven years of age, the jury should find whether child was capable of exercising sufficient judgment so as to be chargeable with contributory negligence.

The Court will decide that a child of very tender years has not sufficient judgment; but, from the nature of the case, it is impossible to prescribe a fixed period when a child has such sufficient judgment as to be guilty of contributory negligence. A nonsuit, on the ground of contributory negligence, is erroneous, and judgment below (opinion in 46 Hun. 184) is reversed.

Appeal from the Supreme Court, General Term, First Department. (46 Hun. 184.)

Adolph L. Sawyer, Esq., for appellant.

Messrs. Robinson, Scribner & Bright, for defendant.

ANDREWS, J., June 4, 1889. The nonsuit was placed on the ground that an infant, seven years of age, was *sui juris*, and that the act of the child, in crossing the street in front of the approaching car, was negligence on her part which contributed to her death, and barred a recovery. We think the case should have been submitted to the jury. The negligence of the driver of the car is conceded. His conduct in driving rapidly along Canal street at its intersection with Orchard street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent: *Mangam* v. *R. R. Co.* (1868), 38 N. Y. 455; *R. R. Co.* v. *Gladmon* (1872), 15 Wall. (82 U. S.) 401.

It cannot be asserted, as a proposition of law, that a child, just passed seven years of age, is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*: *Kunz* v. *City of Troy* (1887), 104 N. Y. 344.

Infants, under seven years of age, are deemed incapable of committing crime, and, by the common law, such incapacity presumptively continues until the age of fourteen. An infant, between those ages, was regarded as within the age of possible discretion; but, on a criminal charge against an infant between those years, the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent: 1 Archb. Crim. Pr. & Pl. 11. The Penal Code preserves the rule of the common law, except that it fixes the age of twelve, instead of fourteen, as the time when the presumption of incapacity ceases: Penal Code, §§ 18, 19.

In administering civil remedies, the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant, three or four years of age, could not be regarded as *sui juris*, and the same was said, in another case, of an infant five years of age: *Mangam* v. *R. R. Co.*, *supra*; *Fallon* v. *R. R. Co.* (1876), 64 N. Y. 13. On the other hand, it was said in *Cosgrove* v. *Ogden* (1872), 49 N. Y. 255, that a lad, six years of age, could not be assumed to be incapable of protecting himself from danger in streets or roads; and, in another case, that a boy of eleven years of age was competent to be trusted in the streets of a city: *McMahon* v. *Mayor* (1865), 33 N. Y. 642. From the nature of the case, it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These, and other circumstances, may enter into the question. It becomes, therefore, a question of fact for the jury, where the inquiry is material, unless the child is of so very tender years that the Court can safely decide the fact.

The trial Court misapprehended, we think, the case of *Wendell* v. *R. R. Co.* (1883), 91 N. Y. 420, in supposing that it decided, as a proposition of law, that a child of seven years was capable of exercising judgment, so as to be chargeable with contributory negligence. It was assumed in that case, both on the trial and on appeal, that the child whose conduct was

in question was capable of understanding, and did understand, the peril of the situation, and the evidence placed it beyond doubt that he recklessly encountered the danger which resulted in his death. The boy was familiar with the crossing, and, eluding the flagman, who tried to bar his way, attempted to run across the track in front of an approaching train in plain sight, and unfortunately slipped and fell, and was run over and killed. It appeared that he was a bright, active boy, accustomed to go to school and on errands alone, and sometimes was intrusted with the duty of driving a horse and wagon, and that on previous occasions he had been stopped by the flagman, while attempting to cross the track in front of an approaching train, and had been warned of the danger. The Court held, upon this state of facts, that the boy was guilty of culpable negligence. But the case does not decide, as matter of law, that all children, of the age of seven years, are *sui juris*.

We are inclined to the opinion that, in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material, as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle, now well settled in this State, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action.

In the present case, the only fact before the jury, bearing upon the capacity of the child whose death was in question, was, that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years. This measure of care is all that the law exacts in such a case: *Thurber* v. *R. R. Co.* (1875), 60 N. Y. 335. The child was lawfully in the street. In attempting to

cross, she was struck by the horse on the defendant's car, and was run over and killed. The evidence would have justified the jury in finding that, when the child stepped down from the curbstone, the car was fifty or more feet away, and the distance from the curbstone to the track of the defendant's road was less than twelve feet. The child, if she saw the car, might very well have supposed that she could get over the track before the car passed. There is evidence that the speed of the car was increased at about the time the child started to cross. It would be very unjust to exact of such a child that degree of care which an adult would exercise under similar circumstances. It was, we think, for the jury to say whether the child's conduct was unusual or unnatural for a child of her years. She probably did not appreciate the rapidity of movement of the car; nor could it be expected that she would weigh the circumstances, or fully understand the danger of attempting to cross in front of the car. The negligence of the defendant's driver is conceded, and it was for the jury to judge whether the conduct of the child, in crossing the street to join another child, engaged in roller-skating on the opposite side, was characterized by any want of that degree of care which children under similar circumstances would usually exercise. There is no question in the case, of negligence on the part of the parent of the child. That point was not presented on the motion for nonsuit. The judgment should be reversed, and a new trial granted.

All concur.

The right of children to play on the sidewalk and street, is not settled.

It is nowhere disputed that children *sui juris* have as much right on the sidewalks and streets as adults, and the same may be said of children *nen sui juris*, in charge of a proper person. But the right to use the sidewalks and street for the purpose of travel is quite different from the use for the purpose of play.

A careful analysis of the decisions will exhibit that there is a distinction between children *sui juris* and children *non sui juris*.

In cases of injury to children *non sui juris*, the doctrine of imputable negligence has, in some jurisdictions, been applied. In cases of injury to children *sui juris*, some courts have applied this doctrine, and others have applied the rule of contributory negligence, without regard to the doctrine of imputable negligence.

It is proposed to establish the proposition, that all children, *sui juris* or *non*

sui juris, have the right to play on the sidewalk and street, and if injury to them can be avoided by the exercise of due care, such care must be used, and for want of such care the defendant is liable, whether there was, or was not, imputable negligence, or contributory negligence.

The first obstacle to this proposition is the doctrine of imputable negligence; which is, that a child *non sui juris* has no right on the sidewalk, or street, unaccompanied by a proper person. This was first announced in *Hartfield* v. *Roper* (1839), 21 Wend. (N. Y.) 615. From the reasoning in this case, and others which follow it, especially *Mangam* v. *R. R.* (1868), 38 N. Y. 455, this doctrine is properly limited to children of "two or three years of age, or even more," who are, what may be termed, helpless, and require the care and protection of another. To this class the doctrine of *Hartfield* v. *Roper* is, that if run down or injured by a traveler, the traveler is not liable, because it was negligence in the parent for a child of this age to be on the street, and it made no difference how the child got on the street alone, it being sufficient that he was there.

In other words, a child of "two or three years or even more" on the street alone, can be run down or injured with impunity.

Now it is conceded by the courts which enforce this doctrine that a child of these years is devoid of all sense of danger; and yet the same courts approve the principle that an animal must not be thus run down, or injured, if it can be avoided by the exercise of due care. This is the law of *Davies* v. *Mann* (1842), 10 M. & W. 546 [a donkey case]; *Mayor of Colchester* v. *Brooke* (1845), 7 A. & E. (N. S.) 377 [an oyster case]; *Townsend* v. *Wathen* (1808), 9 East 277 [a dog case].

Logically, the syllogism is, that all beings and animals devoid of the sense of danger must not be injured, if it can be avoided by the exercise of due care. A child of two or three years of age is such a being, therefore, such a child must not be injured, if it can be avoided by the exercise of due care. The logic of the doctrine in *Hartfield* v. *Roper* is that a child, devoid of the sense of danger, can be run down without the exercise of due care. This doctrine is therefore illogical, and barbarous, and the proper principle is that such a child must not be injured, if it can be avoided by the exercise of due care; which is the same as stating the general and sensible rule that a defendant is liable for any injury caused by his want of due care.

The senseless judicial jugglery of *Hartfield* v. *Roper* obtains in nine States of the Union:—

California,—*Schierhold* v. *R. R.* (1871), 40 Cal. 447; *Meeks* v. *R. R.* (1878), 52 Id. 602; s. c. (1880), 56 Id. 513.

Illinois,—*Gavin* v. *Chicago* (1880), 97 Ill. 66; *Toledo, W. & W. R'y Co.* v. *Grable* (1878), 88 Id. 441; [*City of Chicago* v. *Starr* (1866), 42 Id. 174, repudiated in *City of Chicago* v. *Keefe* (1885), 114 Id. 222; *Stafford* v. *Reubens* (1885), 115 Id. 196; *City of Chicago* v. *Hesing* (1876), 83 Id. 204; *Kerr* v. *Forgue* (1870), 54 Id. 482; *Chicago, St. L. & P. R. R. Co.* v. *Welsh* (1886), 118 Id. 572.]

Indiana,—*Evansville & C. R. R. Co.* v. *Wolf* (1877), 59 Ind. 89; *Jeff. M. & Ind. R. R. Co.* v. *Bowen* (1872), 40 Id. 545; [*City of Indianapolis* v. *Emmelman* (1886), 108 Id. 530; *Mayhew* v. *Burns* (1885), 103 Id. 328.]

Kansas,—*Atch. T. & S. F. R. R. Co.* v. *Smith* (1882), 28 Kan. 541.

Maine,—*Brown* v. *E. & N. A. R'y Co.* (1870), 58 Me. 384; *Leslie* v. *City of Lewiston* (1873), 62 Id. 468; [*Stin-*

son v. *City of Gardner* (1856), 42 Id. 248; *McCarthy* v. *City of Portland* (1878), 67 Id. 167.]

Maryland,—*McMahon* v. *R. R. Co.* (1873), 39 Md. 438; *Baltimore C. P. R'y Co.* v. *McDonnell* (1875), 43 Id. 551.

Massachusetts,—*Lynch* v. *Smith* (1870), 104 Mass. 52; *Gibbons* v. *Williams* (1883), 135 Id. 333; [*Collins* v. *S. B. H. R. R. Co.* (1886), 142 Id. 301; *Blodgett* v. *City of Boston* (1864), 8 Allen (Mass.) 237; *Tighe* v. *City of Lowell* (1876), 119 Mass. 472; *Lyons* v. *Inhab. Brookline* (1876), Id. 491; *Hunt* v. *City of Salem* (1876), 121 Id. 294.]

Minnesota,—*Fitzgerald* v. *R. R. Co.* (1882), 29 Minn. 336.

New York,—*Ihl* v. *R. R. Co.* (1872), 47 N.Y. 323; *Cosgrove* v. *Ogden* (1872), 49 Id. 255; [*Kunz* v. *City of Troy* (1887), 104 Id. 344; *McGarry* v. *Loomis* (1875), 63 Id. 104; *McGuire* v. *Spence* (1883), 91 Id. 303, 306; *O'Mara* v. *R. R. Co.* (1868), 38 Id. 445; *Mangam* v. *R. R. Co.* (1868), 38 Id. 455: *Fallon* v. *R. R. Co.* (1876), 64 Id. 13; *Barry* v. *R. R. Co.* (1883), 92 Id. 289; *Thurber* v. *R. R. Co.* (1875), 60 Id. 326; *Mullany* v. *Spence* (1874), 15 Abb. Pr. N. S. (N. Y.) 319; *Pendergast* v. *R. R. Co.* (1874), 58 N. Y. 652; *Ryder* v. *The Mayor* (1884), 50 N. Y. Super. 221; *Birkett* v. *Ice Co.* (1888), 110 N. Y. 504; *Malone* v. *R. R. Co.* (1889), 51 Hun (N. Y.) 532; *Murphy* v. *Orr* (1884), 96 N. Y. 14; *Barker* v. *Savage* (1871), 45 Id. 191; *Weil* v. *Dry Dock, E. B. & B. R. Co.*, S. Ct. N. Y. City, General Term, June 28, 1889; *Henderson* v. *Knickerbocker I. Co.*, S. Ct., General Term, 1st Dept., May 24, 1889.]

The doctrine of *Hartfield* v. *Roper* has been repudiated in ten States of the Union:—

Alabama,—*Government S. R. R. Co.* v. *Hanlon* (1875), 53 Ala. 70; *Bay Shore R. R. Co.* v. *Harris* (1880), 67 Id. 6.

Connecticut,—*Bronson* v. *Town of Southburg* (1870), 37 Conn. 199; *Birge* v. *Gardiner* (1849), 19 Id. 507.

Missouri,—*Frick* v. *R. R. Co.* (1882), 75 Mo. 542; [*Donahoe* v. *R. R. Co.* (1884), 83 Id. 543.

Nebraska,—*Huff* v. *Ames* (1884), 16 Neb. 139.

Ohio,—*Bellefontaine & I. R. R. Co.* v. *Snyder* (1868), 18 Ohio St. 399; *C. C. C. & I. R. R. Co.* v. *Manson* (1876), 30 Id. 451; *Street Ry. Co.* v. *Eadie* (1885), 43 Id. 91.

Pennsylvania,—*N. Pa. R. R. Co.* v. *Mahoney* (1868), 57 Pa. 187; *P. & R. R. R. Co.* v. *Long* (1874), 75 Id. 257.

Tennessee,—*Whirley* v. *Whiteman* (1858), 1 Head (Tenn.) 610.

Texas,—*G. H. & H. Ry. Co.* v. *Moore* (1883), 59 Tex. 64; *T. M. Ry. Co. & M. N. C. Co.* v. *Herbeck* (1884), 60 Id. 602.

Vermont,—*Robinson* v. *Cone* (1850), 22 Vt. 213.

Virginia,—*Norfolk & P. R. R. Co.* v. *Ormsby* (1876), 27 Grat. (Va.) 455.

In the jurisdictions which assumed to adopt the rule in *Hartfield* v. *Roper*, subsequent decisions have so materially limited the doctrine that there does not seem to be much of it left.

In *McGarry* v. *Loomis* (1875), 63 N. Y. 104, it was announced that the doctrine of imputable negligence does not apply, if the child has not been negligent, and that children have a right to play on the sidewalk. In this case the defendant was held liable, because he was guilty of negligence in causing a pool of hot water, near the sidewalk, and so liable, irrespective of the question whether or not the parent was negligent in allowing a child, four years of age, to play on the sidewalk, knowing the existence of the pool of hot water, and that the child having the right to play on the sidewalk, it was not negligence to play

near a pool of water, because of its age it was not sensible of the danger. This case is therefore nothing more than the assertion of the major premise above stated, that a defendant is liable for injury to children devoid of the sense of danger, when that injury is caused by the defendant's want of due care, and that it was a want of due care to cause a pool of hot water near a sidewalk. As will be hereafter shown, this is the doctrine pervading the adjudications in cases of injuries to children occurring elsewhere than on the sidewalk. This principle was approved and adopted in *McGuire* v. *Spence* (1883), 91 N. Y. 306; *O'Mara* v. *R. R.* (1868), 38 Id. 445; *Mangam* v. *R. R.* (1868), 38 Id. 455; *Fallon* v. *R. R.* (1876), 64 Id. 13; *Barry* v. *R. R.* (1883), 92 Id. 289; *Thurber* v. *R.R. Co.* (1875), 60 Id. 326; *Mullany* v. *Spence* (1874), 15 Abb. Pr. N. S. (N. Y.) 319; *Pendergast* v. *R. R.* (1874), 58 N. Y. 652; *Ryder* v. *The Mayor* (1884), 50 N. Y. Super. 221; *Birkett* v. *Ice Co.* (1888), 110 N. Y. 504.

But, to be more specific, it has been held that in an action for injury to a child *non sui juris* (and, *a priori*, injury causing death), the defendant was held liable, because the engineer did not stop the train, or check its speed, upon notice of the danger to the child, which due care required, and which would have avoided the injury: *Donahue* v. *R. R.* (1884), 83 Mo. 543; *Phila. & R. R. R. Co.* v. *Long* (1874), 75 Pa. 257.

Because the defendant left water-pipe piled up in the street, so loose that the child, while playing upon them, was killed: *Stafford* v. *Reubens* (1885), 115 Ill. 196. Because the defendant caused a ditch near the sidewalk, into which the child fell and was drowned: *Chicago* v. *Hesing*, 83 Ill. 204. Because the defendant did not remove, as was its duty, a large, heavy counter, placed on the sidewalk, tilted in such a manner as to be easily thrown down: *Kunz* v. *City of Troy* (1887), 104 N. Y. 344. In this case the Court stated that a child *non sui juris* cannot be guilty of negligence, and that *sui juris* means of sufficient discretion to understand the danger. The defendant was liable because he put the counter on the street, which caused the injury, although it would not have fallen had the child not attempted to jump on it: *Kerr* v. *Forgue* (1870), 54 Ill. 482.

Because the driver of the street car was not watching for pedestrians, which was his duty: *Ihl* v. *R. R.* (1872), 47 N. Y. 317. Because the driver could have stopped the car in time to prevent the injury, had he been on the lookout, as was his duty: *Thurber* v. *R. R. Co.* (1875), 60 Id. 326. Because the driver was not sufficiently vigilant and careful, for, if he had been, "he would have seen the child in time to avoid injuring her": *Birkett* v. *Ice Co.* (1888), 110 N. Y. 504.

Because the city left the excavation unguarded and unfenced: *Ryder* v. *The Mayor* (1884), 50 N. Y. Super. 221.

Because the city did not keep the sidewalk in a reasonably safe state of repair: *City of Chicago* v. *Keefe* (1885), 114 Ill. 222, which repudiates *City of Chicago* v. *Starr* (1866), 42 Id. 174.

The converse of the position of the foregoing cases is illustrated by the following, where it was held that the defendant was not liable because he committed no negligence, or rather omitted no duty, inasmuch as the child would not have been drowned had the plaintiff repaired, or caused to be repaired, or guarded, the excavation of which he had full notice: *Mayhew* v. *Burns* (1885), 103 Ind. 343. Because the defendant was carrying on its own business upon its own property without the omission of any duty, and thus had no reason to apprehend that a child, three and one-half years of age, would come up on

its track, in such a place, and in front of a slowly moving freight: *Malone* v. *R. R.* (1889), 51 Hun (N. Y.) 532. Because the fault rested with those who had charge of the child, and the defendant was without fault: *The Burgundia* (1886), U. S. D. Ct., S. Dist. N. Y., 29 Fed. Repr. 464.

This is the principle upon which all the cases are based, except in Massachusetts and Maine, in cases against municipal corporations, because their liability is limited by statute: *Blodgett* v. *City of Boston* (1864), 8 Allen (Mass.) 237; *Stinson* v. *City of Gardiner* (1856), 42 Me. 248; *McCarthy* v. *City of Portland* (1878), 67 Id. 167; *Tighe* v. *City of Lowell* (1876), 119 Mass. 472; *Lyons* v. *Inhab. Brookline* (1876), Id. 491; *Hunt* v. *City of Salem* (1876), 121 Id. 294; yet the New Hampshire Court, under a similar law, criticises the principle sought to be applied by these cases: *Varney* v. *Manchester* (1878), 58 N. H. 430, 434.

No adjudication discovered by the writer, after a laborious research, has announced any rule or principle, by which the right of children to be and to play upon the sidewalk and street, is governed or controlled. The majority of the cases have gone off on the minor, or subsidiary question, of whether or not the parent has been guilty of negligence; and others, upon the question whether or not the child, though *non sui juris*, has been guilty of negligence; while the minority of the cases place the ruling upon the principle contended for, yet, through all the cases, may be found the proposition that, with respect to children under the age of adult discretion, the defendant should be held liable, if he has failed in any duty.

The rule announced is enforced by the application of fundamental principles:

First. The sidewalk and street is for the use of all persons, children as well as adults, as a matter of right.

Second. In the exercise of one's own right, he must take due care not to interfere with the rights of others, and if he uses any agency or power in the exercise of this right, such as driving a horse, he must use the vigilance and care commensurate with the agency employed, and is therefore liable for any interference with another's right, if it could be avoided by the exercise of due care: *Murphy* v. *Orr* (1884), 96 N. Y. 14; *Barker* v. *Savage* (1871), 45 Id. 191.

Third. Children are required to exercise only such care and prudence as may reasonably be expected from their age and the circumstances of the case; the question being, did the child have the capacity to properly anticipate the danger and guard against it, the defendant being without fault; which is nothing more than the rule in *Lynch* v. *Nurdin* (1841), 1 A. & E. (N. S.) 29; *R. R. Co.* v. *Stout* (1873), 17 Wall. (84 U. S.) 657; *Gray* v. *Scott* (1870), 66 Pa. 345; *Robinson* v. *Cone* (1850), 22 Vt. 213; *Lynch* v. *Smith* (1870), 104 Mass. 52; *Mulligan* v. *Curtis* (1868), 100 Id. 512; *Hicks* v. *R. R. Co.* (1877), 64 Mo. 430; *R. R. Co.* v. *Gladman* (1872), 15 Wall. (82 U. S.) 40; *Kay* v. *R. R. Co.* (1870), 65 Pa. 269; *Manly* v. *R. R.* (1876), 74 N. C. 655; *Mobile & M. Ry. Co.* v. *Crenshaw* (1880), 65 Ala. 566; *Barry* v. *R. R. Co.* (1883), 92 N. Y. 289; *Byrne* v. *R. R. Co.* (1881), 83 N. Y. 620; *Houston & T. C. Ry. Co.* v. *Simpson* (1883), 60 Tex. 103; *G. H. & H. Ry. Co.* v. *Moore* (1883), 59 Tex. 64; *Plumley* v. *Birge* (1878), 124 Mass. 57; *Meibus* v. *Dodge* (1875), 38 Wis. 300; *Chicago & N. W. Ry. Co.* v. *Smith* (1881), 46 Mich. 504.

Fourth. Parents are required to exercise such care as the circumstances of the case and their circumstances in life permit, which, being a question of fact, is for the jury: *Isabel* v. *R. R. Co.* (1875), 60 Mo. 475; *Walters* v. *R. R.*

Co. (1875), 41 Iowa 71; *Pittsburg, A. & M. Ry. Co.* v. *Pearson* (1872), 72 Pa. 169; *P. & R. R. R. Co.* v. *Long* (1874), 75 Id. 257; *Glassy* v. *R. R. Co.* (1868), 57 Id. 172; *O'Flaherty* v. *R. R. Co.* (1869), 45 Mo. 70; *Kay* v. *R. R. Co.* (1870), 65 Pa. 269.

Fifth. A higher degree of care must be exercised towards children, than towards adults: *P. & R. R. R. Co.* v. *Spearen* (1864), 47 Pa. 300; *Smith* v. *O'Connor* (1864), 48 Id. 218; *P. R. R. Co.* v. *Morgan* (1876), 82 Id. 134; *Isabel* v. *R. R. Co.* (1875), 60 Mo. 475; *C. B. & Q. R. R. Co.* v. *Dewey* (1861), 26 Ill. 259; *Bannon* v. *R. R. Co.* (1865), 24 Md. 108; *Walters* v. *R. R. Co.* (1871), 41 Iowa 71; *O'Mara* v. *R. R. Co.* (1868), 38 N. Y. 445; *Singleton* v. *Ry. Co.* (1859), 7 C. B. (N. S.) 287. Because an adult has legal descretion and a child has not; hence due care means the degree of care in proportion to the capacity of the child to anticipate the danger and guard against it; and therefore, due care as to adults, would be gross negligence as to children: *Robinson* v. *Cone* (1850), 22 Vt. 213; *Pittsburg A. & M. R. R. Co.* v. *Caldwell* (1873), 74 Pa. 421; *Lucas, Adm'r,* v. *R. R. Co.* (1856), 6 Gray (Mass.) 71; *Kerr* v. *Forgue* (1870), 54 Ill. 484; *Brannon* v. *R. R. Co.* (1877), 45 Conn. 284; *Walters* v. *R. R. Co.* (1875), 41 Iowa 71; *East Saginaw Ry. Co.* v. *Bohn* (1873), 27 Mich. 503; *Kenyon* v. *R. R. Co.* (1875), 5 Hun (N. Y.) 479; *T. & P. Ry. Co.* v. *O'Donnell* (1882), 58 Tex. 27; *G. C. & S. F. Ry. Co.* v. *Evansich* (1884), 61 Id. 3.

Now if children, *sui juris* or *non sui juris*, have a right on the sidewalk and street (and the adjudications have modified *Hartfield* v. *Roper* to this extent: *McGarry* v. *Loomis* (1875), 63 N. Y. 104; *Karr* v. *Parks* (1879), 40 Cal. 188; *Mangam* v. *R. R. Co.* (1868), 38 N. Y. 455; *Jetter* v. *R. R. Co.* (1866), 2 Keyes (N. Y.) 154; *O'Flaherty* v. *R. R. Co.* (1869), 45 Mo. 70; *Cosgrove* v. *Ogden* (1872), 49 N. Y. 255; *Schierhoed* v. *R. R. Co.* (1871), 40 Cal. 447; *Drew* v. *R. R. Co.* (1862), 26 N. Y. 49; *Lynch* v. *Smith* (1870), 104 Mass. 52; *Ihl* v. *R. R. Co.* (1872), 47 N. Y. 317; *East Saginaw Ry. Co.* v. *Bohn* (1873), 27 Mich. 503; *Bellefontaine & I. R. R. Co.* v. *Snyder* (1868), 18 Ohio St. 399; *McMahon* v. *R. R. Co.* (1873), 39 Md. 438; *Mulligan* v. *Curtis* (1868), 100 Mass. 512); then it is immaterial whether the child is there through the negligence of the parents or not. Being on the sidewalk by right, and only required to exercise the care commensurate with its age and descretion, and the defendant compelled to exercise a higher degree of care towards children than to adults, it follows that, as to children devoid of the sense of danger, or incapable of anticipating danger and guarding against it, there can be no contributory negligence, and the rule is that the defendant is liable, if he could have avoided the injury by the exercise of due care. This the courts have asserted in modification of the rule (in *Hartfield* v. *Roper*): *Baltimore C. P. Ry. Co.* v. *McDonnell* (1875), 43 Md. 556; *McMahon* v. *R. R.* (1873), 39 Id. 439; *Barksdull* v. *R. R. Co.* (1871), 23 La. An. 180, which is substantially the rule in *Davies* v. *Mann* (1842), 10 M. & W. 546, that if a traveler can, by the exercise of ordinary care, avoid doing an injury to something exposed in the highway, he is bound to do it. If such a child is injured, notwithstanding the exercise of due care on the part of the defendant, then there is no cause of action. The child did not contribute, because it was incapable of contributing; the defendant is not liable, because he committed no breach of duty.

In such cases, the sole question is, did the defendant fail to exercise due care? and this the weight of the authorities approve: *Robinson* v. *Cone* (1850), 22

Vt. 213; *N. P. R. R. Co.* v. *Mahony* (1868), 57 Pa. 187; *P. R. R. Co.* v. *Kelly* (1858), 31 Id. 372; *Rauck* v. *Lloyd* (1858), Id. 358; *P. & R. R. Co.* v. *Spearen* (1864), 47 Id. 300; *Smith* v. *Connor* (1864), 48 Id. 218; *Glassey* v. *R. R. Co.* (1868), 57 Id. 172; *Kay* v. *R. R. Co.* (1870), 65 Id. 269; *P. & R. R. R. Co.* v. *Long* (1874), 75 Id. 257; *Gov. S. R. R. Co.* v. *Hanlon* (1875), 53 Ala. 70; *Bellefontaine & I. R. R. Co.* v. *Snyder* (1868), 18 Ohio St. 399; *C. C. C. & I. R. R. Co.* v. *Manson* (1876), 30 Id. 451; *Norfolk & P. R. R. Co.* v. *Ormsby* (1876), 27 Grat. (Va.) 455; *Birge* v. *Gardner* (1849), 19 Conn. 507; *Daley* v. *R. R.* (1858), 26 Id. 591; *Bronson* v. *Town of Southbury* (1870), 37 Id. 199; *Boland* v. *R. R. Co.* (1865), 36 Mo. 484; *Stillson* v. *R. R. Co.* (1878), 67 Id. 671; *Frick* v. *R. R. Co* (1882), 75 Id. 542; *Huff* v. *Ames* (1884), 16 Neb. 139; *Whirley* v. *Whiteman* (1858), 1 Head (Tenn.) 610; *G. H. & H. Ry. Co.* v. *Moore* (1883), 59 Tex. 64; *T. & P. Ry. Co.* v. *O'Donnell* (1882), 58 Id. 27; *H. & T. C. Ry. Co.* v. *Simpson* (1883), 60 Id. 103; *T. M. Ry. Co. et al.* v. *Herbeck* (1884), 60 Id. 602.

According to the adjudications, this rule does not apply to children injured by the negligence of the parent, while in the actual custody and control of such parent: *N. P. R. R. Co.* v. *Mahony* (1868), 57 Pa. 187; *Holly* v. *Gas Co.* (1857), 8 Gray (Mass.) 123; *Pittsburg, A. & M. R. R. Co.* v. *Caldwell* (1873), 74 Pa. 421; *Bellefonte & I. R. R. Co.* v. *Snyder* (1868), 18 Ohio St. 399; *East Saginaw C. Ry. Co.* v. *Bohn* (1873), 27 Mich. 503; *Stillson* v. *R. R. Co.* (1878), 67 Mo. 671; *Lannen* v. *Gas Co.* (1865), 46 Barb. (N.Y.) 264; *R. R.* v. *Stratton*, 76 Ill. 38; *Carter* v. *Towne* (1868), 98 Mass. 567; *Morrison* v. *R. R. Co.* (1874), 56 N. Y. 302; though it is difficult to understand what inherent reason can exist for excusing a defendant who has committed a breach of duty, because the parent was negligent, notwithstanding the injury would not have occurred had the defendant exercised due care.

With respect to children *sui juris*, the rule in *Lynch* v. *Nurdin*, and not the rule applicable to children *non sui juris*, applies, because they are capable of exercising discretion, and of recognizing danger and providing against it, but only in proportion to their age and prudence.

As stated above, a higher degree of care must be used towards children than adults, because of the smaller degree of judgment and discretion possessed by children; hence, if ordinary care is required with respect to adults, it follows that extraordinary care must be exercised towards children, and, therefore, the sole question would be, did the defendant exercise this due care? If he did not, he should be held liable. If he did, he is not liable. If, on the one hand, the child is only required to exercise the care which may be expected from his age and intelligence, and, on the other, the defendant must exercise extraordinary care—or a higher degree of care than ordinary care—it is difficult to understand why a defendant who has failed to exercise the care which the law demands, and thereby caused the injury, should be exempt from liability, when a child, capable of exercising childish care, has failed or forgotten to use that care. As a matter of reason and nature, the omission of a child to exercise childish care, ought not to be allowed to excuse the want of due care in an adult.

The rule in *Lynch* v. *Nurdin* does not extend to the question whether, or not, the child exercised the care expected from one of his age and judgment, but is based entirely upon the question, Did the defendant exercise due care? Hence, due care required

him not to leave his horse and cart unhitched and unattended in the street, where children might get hurt by playing with or about it: *Lynch* v. *Nurdin* (1841), 1 A. & E. (N. S.) 29; *Clark* v. *Chambers* (1878), L. R., 3 Q. B. Div. 327.

And that he do not leave his turntables unguarded and unlocked in a place likely to attract children, even upon his own ground: *R. R. Co.* v. *Stout* (1873), 17 Wall. (84 U. S.) 657; S. C. 2 Dill. (U. S. C. Ct., Dist. Neb.) 294.

Nor leave a tilted bulkhead so exposed on the sidewalk, that a child may throw it over and suffer injury: *Birge* v. *Gardner* (1849), 19 Conn. 507.

Nor pile lumber in such a place, and in such a way, as to fall on children should they play upon it: *Cosgrove* v. *Ogden* (1872), 49 N. Y. 255; *McAlpin* v. *Powell* (1878), 55 How. Pr. (N. Y.) 163; *Venderbeck* v. *Hendry* (1871), 34 N. J. L. 467.

Nor use dangerous or hazardous instrumentalities, exposed where children may get at them: *Boland* v. *R. R. Co.* (1865), 36 Mo. 484; *Wood* v. *School Dist.* (1876), 44 Iowa 27; *Lyons* v. *Inhab. Brookline* (1876), 119 Mass. 491; *Kerr* v. *Forgue* (1870), 54 Ill. 482; *Keffe* v. *R. R. Co.* (1875), 21 Minn. 207; *Nagle* v. *R. R. Co.* (1882), 75 Mo. 653; *Kansas C. Ry. Co.* v. *Fitzsimmons* (1879), 22 Kan. 686; *Koons* v. *R. R. Co.* (1877), 65 Mo. 592.

Nor expose on his premises, or where children may, or are, likely to resort, or be attracted, any dangerous tool, or machine, or contrivance: *Stout* v. *Sioux City & P. R. R. Co.* (1872), U. S. C. Ct., Dist. Neb., 2 Dill. 294; *R. R. Co.* v. *Stout* (1873), 17 Wall. (84 U. S.) 657; only questioned in *St. L. V. & T. H. R. R. Co.* v. *Bell* (1876), 81 Ill. 76; *McAlpin* v. *Powell* (1877), 70 N. Y. 126; and rejected in *Lane* v. *Atlantic Works* (1872), 111 Mass. 136; *Hughes* v. *Macfie* (1863), 2 H. & C. 744; *Mangan* v. *Atterton* (1866), L. R. 1 Ex. 239.

This proper rule has been carried so far that, where children were injured while playing on a railroad track, the defendant was held liable if the injury could have been avoided: *Morrissey* v. *R. R. Co.* (1879), 126 Mass. 377; *Eckert* v. *R. R. Co.* (1871), 43 N. Y. 502; *Central Br. U. P. R. R. Co.* v. *Henigh* (1880), 23 Kan. 347; *Smith* v. *R. R. Co.* (1881), 25 Id. 738.

In conclusion, it is believed to be the rule that, for injuries to children, *sui juris* or *non sui juris*, while on the sidewalk or street, whether at play or not, to hold the defendant liable, if he has failed to exercise the care required, irrespective of any other question.

JOHN F. KELLY.

St. Paul, Minn.